IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
NOV 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1798

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 81-91

OREGON-COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF DONALD SCHRIVER, INC., TOPAZ CONTRACTING AND DEVELOPMENT CO., INC. AND SULLIVAN AND ASSOCIATES IN SUPPORT OF PETITIONERS

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No. 81-91

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ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, INC.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF DONALD SCHRIVER, INC., TOPAZ CONTRACTING AND DEVELOPMENT CO., INC. AND SULLIVAN AND ASSOCIATES IN SUPPORT OF POSITION OF WOELKE & ROMERO FRAMING, INC., PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., AND OREGON-COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

INTEREST OF AMICI CURIAE*

The resolution of the issues in this case directly affects Donald Schriver, Inc., Topaz Contracting and Development Co., Inc. and Sullivan and Associates (amici curiae herein) who have also filed a petition for writ of certiorari from the District of Columbia Circuit which been docketed in this Court as No. 80-1257. A timely petition for rehearing

* Pursuant to Rule 36.2 of the Rules of this Court, written consents of the parties to the filing of this brief have been obtained and have been lodged with the Clerk of the Court.

from denial of certiorari was filed in Schriver-Topaz in August, 1981. The Court has decided not to act on the rehearing petition in view of the grant of certiorari in Woelke & Romero and Pacific Northwest [1].

In the Schriver-Topaz case, the labor organizations sought to obtain the identical restrictive subcontracting clauses involved in the Woelke & Romero case. Schriver and Topaz are contractors

[1] As Petitioners in Donald Schriver, Inc., et al v. NLRB, No. 80-1257, we have ascertained that the Court held a conference on the petition for rehearing in No. 80-1257 and took no action. It is believed that this lack of action is predicated upon the related and identical legal issue with respect to the restrictive subcontracting clauses and coercive efforts to obtain them involved in Woelke & Romero, Pacific Northwest Chapter of ABC and Oregon Chapter of AGC, Nos. 80-1798, 80-1808 and 81-91, in which certiorari was granted at the commencement of the October, 1981 Term.

who had no bargaining relationship with the labor organizations at the time the restrictive clauses were sought while in the case of Woelke & Romero and Pacific Northwest, the clauses were sought in the context of a bargaining relationship.

Schriver and Topaz (the amici curiae)* will be directly affected by the decision of the Court in these cases, for they have likewise urged upon this Court, in their petition, the illegality of the clauses involved as being violative of Section 8(e) of the Labor Act.

The cases are further interrelated in that one of the questions presented in the instant case deals with the legality of picketing to obtain a clause prohibited by Section 8(e).

Schriver and Topaz will also be directly affected by a decision of the Court on the legality of picketing to obt ain such clause. Before the NLRB when Schriver and Topaz and the instant cases

* Sullivan and Associates is a management consultant and charging party before the National Labor Relations Board who represents Schriver and Topaz.

were consolidated for oral argument, Schriver-Topaz urged the Board to find such picketing illegal whether or not the clause involved complied with Section 8(e). The undersigned counsel for Schriver-Topaz also appeared at oral argument before the NLRB as counsel for the Chamber of Commerce of the United States, as amicus curiae, and in that capacity made similar arguments on the illegality of the picketing on behalf of all the parties and urged the Board to re-examine and reverse its position in Northeastern Indiana Bldg. Trades Council (Centlivre Village Apts.), 148 NLRB 854 (1964) (see Operating Engineers Local 701, et al. (Pacific Northwest, et al.), 239 NLRB 274, n. 2, and Carpenters Local No. 944, et al. (Woelke & Romero, et al.), 239 NLRB 241, n.2. The Board specifically refused to reverse this position in the Los Angeles Bldg. & Construction Trades Council (Donald Schriver, Inc., et al.), 239 NLRB 253, 269, n. 19, case. However, the decision in all the cases issued on the same day and were cross-referenced to each other.

See Carpenters Local No. 944 (Woelke & Romero, et al.), 239 NLRB 241, 243, n.5. Schriver and Topaz were likewise subjected to picketing by the unions' efforts to secure such clauses but the NLRB and the D. C. Circuit in Schriver-Topaz believed that such picketing was not violative of Section 8(b)(4)(A) because it was arguably condoned under Section 8(b)(7)(C).

A further interest of the amici curiae herein is that the ~~granting~~ REVERSAL of the ~~motion~~ PANEL by the Ninth Circuit in its en banc panel decision in the instant case relied upon the decision of the D. C. Circuit in Schriver-Topaz v. NLRB, 635 F.2d 859 (D.C. Cir. 1980, cert. denied, 49 U.S. L.W. 3822 (May 5, 1981), timely rehearing petition filed and pending).*

When Schriver-Topaz along with Pacific Northwest and Woelke & Romero were consolidated for oral argument before the NLRB in 1978, these cases were the first cases to be considered by the

* (See Appendix A - Woelke & Romero Framing, Inc. v. NLRB, No. 80-1798 petition for certiorari, p. 6, n. 6; p. 37, n. 37; p. 40.)

NLRB in formulating its policy under Section 8(e) of the Labor Act in light of this Court's decision in Connell Construction Co., Inc. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616 (1975).

Accordingly, the amici curiae will be directly affected by the outcome of the Court's decision in the instant cases

ARGUMENT

I

THE EFFECT OF THE ILLEGAL CLAUSES AND THE EFFORT TO OBTAIN THEM FROM CONTRACTORS WHO DO NOT HAVE A BARGAINING RELATIONSHIP MUST BE CONSIDERED AS PART OF THE "TOP DOWN ORGANIZING" IMPACT

The petitions for certiorari concern two separate cases of secondary boycott which were consolidated at both the Board [1] and appellate levels.

[1] The consolidation before the NLRB for purposes of oral argument in 1978 was a consolidation order that included Woelke & Romero Framing, Inc., Pacific Northwest Chapter of ABC, and Oregon-Columbia Chapter of AGC as well as Schriver-Topaz, the petitioners in No. 80-1257 (the amici curiae herein), and resulted in related interfaced decisions when issued by the NLRB on November 19, 1978.

These cases were consolidated before the Board because they each presented, in a somewhat different factual context, efforts by the labor organizations involved to secure subcontracting clauses that were arguably violative of Section 8(e). In consolidating these cases, the NLRB asked each of the parties how the Board should formulate its policies under Section 8(e) and Section 8(b)(4)(A) when efforts to secure clauses arguably violative of Section 8(e) are sought in light of the U. S. Supreme Court's decision in Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616 (1975), hereinafter referred to as Connell. These consolidated cases were the first occasion that the Board had to consider the Court's Connell decision as it applied to the securing of such contract clauses arguably protected by the construction industry proviso. The decision of the D. C. Circuit in Schriver and Topaz v. NLRB, No. 80-1257, was the touchstone for the en banc panel's reversal of the panel's decision in the instant case (see p. 6 , supra.)

The amici curiae are contractors that never had a bargaining relationship with a labor organization but were subjected to picketing to obtain the identical restrictive subcontracting clauses involved in Woelke & Romero Framing, Inc. v. NLRB, No. 80-1798. The labor organizations in Schriver-Topaz attempted to distinguish this Court's Connell decision by urging that the mere fact that the clauses in Schriver-Topaz were sought as part of a full collective bargaining agreement protected the picketing from the proscriptions of the Labor Act.

It is respectfully urged herein by the amici curiae that these clauses are overbroad and do not conform to the statutory language, the Congressional intent in the enactment of Section 8(b)(4)(A) and 8(e) and are inconsistent with the rationale of Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975). The holding of this Court in the instant case with respect to the legality and permissible breadth of subcontracting clauses will have a direct

effect upon Schriver-Topaz and other similarly situated contractors from whom labor organizations may in the future seek subcontracting clauses. Whether and under what circumstances such clauses may be obtained from contractors that do not have a bargaining relationship with a labor organization is the question presented in Schriver-Topaz No. 80-1257, in which a timely petition for rehearing is pending

The instant case also presents the Court with its first opportunity to consider the legality of picketing to obtain clauses arguably violative of Section 8(e). In this case, the Court will consider that question in the context of picketing an employer who already has a bargaining relationship with the labor organization. Should the Court agree to hear the Schriver-Topaz case, the Court will have the opportunity of considering that question in the context of when there is no existing bargaining relationship at the time of the picketing or other coercive

pressure[2].

In Connell, the Court addressed the question of "top down organizing" as well as the permissible scope and breadth of secondary subcontracting clauses in the construction industry. The Board in its decision in the instant cases and in Schriver-Topaz attempted to limit Connell to the special facts involved in that case.

The Ninth Circuit in the instant case and the District of Columbia Circuit in Schriver-Topaz have adopted three different views of the legal scope of secondary subcontracting restrictions. The District of Columbia Circuit perceives no limitation upon such restrictions. They are enforceable at all present and future jobsites regard-

[2] The Schriver-Topaz case also presents the Court with the important question of whether a contractor who has no bargaining relationship with a labor organization may be subjected to any picketing to secure a subcontracting clause violative of Section 8(e) notwithstanding that it is tendered as part of a full collective bargaining agreement and notwithstanding that Section 8(b)(7)(C) would permit picketing for a reasonable period not to exceed 30 days

less of whether members of the signatory unions will be working at the jobsite and subcontracting restrictions apply to all contractors who have contracts with any craft unions affiliated with the District Council, not just to a particular union. The Ninth Circuit en banc majority limits secondary subcontracting restrictions to contractors having agreements with the same signatory union but applies them to jobsites where members of the signatory union are not working. The four dissenting Ninth Circuit Judges conclude the Court's phrase "particular job site" (421 U.S. at 635) places outside the Section 8(e) construction industry proviso subcontracting restrictions extending to any jobsite where the signatory contractor does not employ union members (dissenting opinion of J. Sneed,

2 Continued ...
if a lawful contract (one not including a clause prohibited by Section 8(e)) were tendered.

Schriver-Topaz also presents the question whether picketing to secure a "pre-hire" agreement that may voluntarily be entered into under Section 8(f) is violative of Section 8(b)(4)(A) even if such clause fell within the construction industry proviso.

Pet. App. 44, and of J. Farris, Pet. App. p. 50). ~~Connell at 421 U.S. at 635.~~

II

RESTRICTIVE SUBCONTRACTING CLAUSES WHERE SOUGHT IN THE CONTEXT OF A COLLECTIVE BARGAINING RELATIONSHIP ARE VIOLATIVE OF SECTION 8(e) [3]

Amici curiae in this section will limit their analysis to the restrictive subcontracting clauses involved in the Woelke & Romero case as these are the same clauses that are involved in the Schriver-Topaz case (certiorari pending). Schriver-Topaz as well as Woelke & Romero are carpentry subcontractors from whom the labor organizations involved sought to obtain these clauses through coercion.

[3] It is respectfully urged by the amici curiae that the Court reserve the question of the lawfulness of such clauses or the effort to obtain them where sought coercively from an employer who had no prior bargaining relationship with the labor organization and whether the effort to obtain such a clause either coercively or voluntarily is cured by merely including such clause in a tendered collective bargaining agreement (see Questions Presented in Schriver-Topaz v. NLRB, et al., No. 80-1257).

It is respectfully suggested that the Master Labor Agreement (MLA) and the Local Agreements involved in Woelke & Romero and Schriver-Topaz are outside the protection of the construction industry proviso to Section 8(e) because they are overbroad. Neither clause is limited to a particular jobsite nor confined to specific time periods. A signatory subcontractor such as Woelke and Romero or stranger contractors from whom the clauses are sought such as Schriver and Topaz have employees actually working on a jobsite who possess the craft skills Respondents customarily represent. Moreover, they apply to subcontractors who actually have no power to determine whether other subcontractors on the job will be union or non-union. See NLRB v. Denver Bldg. Council, 341 U.S. 675, 677 (1951) (job site picketing to force general contractor to cease doing business with non-union electrical subcontractor).

These restricted clauses are not limited to particular existent jobsites but apply to multi sites in futuro well

beyond the term of contract. The Connell opinion recognized the explicit prohibition on "top down organizing" contained in the provisions of the 1959 amendments, Sections 8(b)(4), 8(b)(7) and the safeguards to Section 8(f). These sections of the Act directly effectuate the statutory mandate of preserving employees' freedom of choice. Accordingly, this central policy necessarily limits the scope of the proviso. Therein Congress intended to exempt only those situations similar to Denver Bldg. where the union seeks to insulate its members from non-union employees on the same jobsite. Concurrent and primary Congressional concern to foreclose "top down organizing" dispels any inference that Congress intended any application of the proviso beyond that limited situation. Indeed, the legislative history canvassed in Connell demonstrated that only "certain secondary activities on the construction site" (421 U.S. at 630) were authorized by the proviso, and that those related only to the insulation of union

and non-union employees. 421 U.S. at 629-631. The Court significantly summarized its holding in the following language (421 U.S. at 635):

> "We therefore hold that this agreement which is outside the context of a collective bargaining relationship and not restricted to a particular job site ... may be the basis of a federal antitrust suit ..."

This accurately reflects the realities of the construction industry, yet, the restrictive clauses here would limit Woelke and Romero's subcontracting options even when the pressuring union would have no employees working who could be the object of any type of representative interest. The clause, as applied to Woelke and Romero is directly contrary to the particular jobsite restriction set forth in Connell, because the clause here is not limited to a particular jobsite. Thus, the clause is well outside the proviso because it cannot be determined in advance whether a particular union will have any legitimate representational interest on a future jobsite. Therefore, it can be readily

observed that such broad clauses encourage "top down" unionization of subcontractors in order to maintain their eligibility to bid on work made available by contractors restricted by such open ended provisions. Accordingly, the clauses here are not privileged under the construction industry proviso [4].

The Connell Court's reference (421 U.S. at 633) to "common situs relationships to particular job sites" which "possibly" could fairly fall in the construction industry proviso does not apply to a general contractor without employees or any subcontractor with or without employees. The sole situation permitted by the proviso is significant, but not unlimited -- it permits a labor organization to obtain a restrictive subcontracting agreement (limited to union contractors) from a contractor who

[4] This is not to say, however, that a union could lawfully force a general contractor without any relationship whatsoever with the pressuring union to execute an agreement and to limit subcontracts to union contractors solely because the restrictive clause is properly limited to that particular jobsite. Such a caveat nullifies the Connell Court's prerequisite of "a collective bargaining relationship" and broadens the proviso narrowed by Connell.

is already present on the jobsite and who has employees actually working who possess the same craft or skills as are normally represented by the pressuring union, provided the contractor has the authority to determine whether union or non-union subcontractors will perform other work on the jobsite. This view of the proviso accurately mirrors the 1959 legislative compromise not to overrule Denver Bldg. while permitting construction unions limited means of securing all-union jobsites [5].

[5] However, as set forth above, the major emphasis in Connell on limiting the Section 8(e) proviso to avoid undermining employee free choice, and the emphasis there and in NLRB v. Iron Workers, 434 U.S. 335 (1978), upon Congress's concern about "top down organizing" in the construction industry, requires the conclusion that such protected subcontracting agreements can only be enforced by coercive pressures after the contractor's employees have indicated either by union designation cards or a secret ballot election their choice of the signatory union as their collective bargaining representative, thereby establishing the requisite Section 9(a) relationship. Only such an accommodation cn properly balance and effectuate the competing interests reflected in Congress's compromise between employee representational interests and union objectives in securing all-union jobsites.

In addition to the overbroad feature described above, Section 103 of the MLA and Article IV of the Local Agreements are also unlawful under the Connell rationale because the subcontracting restrictions apply at all times during the term of the agreement regardless of whether Woelke and Romero have carpentry employees actually at work on a jobsite. The MLA clause applies to a wide variety of craft employees, none of whom, other than carpenters, are ever employed by Woelke and Romero. Thus, there can be no possibility of any representation interest on the part of these craft unions. Proper application of Justice Powell's analysis necessarily requires restrictive subcontracting clauses which contain language limiting their scope to those time periods when the signatory contractor actually has employees at work who are normally represented by the signtory union. Otherwise, unions could restrict the subcontracting discretion of employers with whom no bargaining relationship of any type could ever be established. Restrictions on contractors subcontracting discretion must take into

account and reflect the actual modus operandi of the particular contractor. For example, in the case of a typical carpentry subcontractor or a general contractor, such contractor's employees are usually not present when the initial excavation work is performed or when finishing work such as landscaping at the conclusion of the project is performed[6]. Yet the broad subcontracting clause would impose subcontracting restrictions on the signatory subcontractor with respect to work not performed by employees and work to be performed when his employees are absent from the jobsite.

Finally, both Sections 103 of the MLA and Article IV of the Local Agreements are outside the protection of the construction industry proviso because permissible subcontracting awards are limited only to those employees with relationships to unions affiliated with the Council rather than to any labor organization. Such provisions exceed the scope of the limited purpose of Section

[6] These were the facts stipulated in the Schriver-Topaz record.

8(e) proviso. At most, Congress intended, in certain limited circumstances described above, to permit the segregation of union and non-union employees at a particular jobsite, not segregation between members of different labor organizations. There is no legitimte labor law policy served by an agreement that reserves a construction site for members of a particular union to the exclusion of employees belonging to different unions. Such a plain incursion upon employees' freedom of choice finds no support in the 1959 legislative history. Such clauses would result in the exclusion of all rival unions on a construction site by means of the very "top down" organizing device condemned by Congress in the construction industry proviso to Section 8(e). The obvious impact of such an exclusion would impermissibly discourage employees changing representation from included to excluded unions because of the consequential loss of employment opportunities. Cf. Radio Officers' Union v. NLRB, 347 U.S. 17

(1954). Likewise, it would provide an unlawful economic incentive for such employees initially to select an included union over an excluded union to avoid the same unwelcome consequence. It is plain then that these restrictive clauses primarily and thus unlawfully serve the illegitimate function of bringing economic pressure on non-union contractors and their employees to accept unionization to establish eligibility for subcontract work regardless of the actual wishes of the non-union craft employees.

There is, of course, no justification for considering even the existence of a collective bargaining relationship to privilege restrictive subcontracting clauses regardless of the scope of the clause. The Connell Court's concern for the breadth of such clauses was explicit. Thus the Court twice stated that subcontracting clauses must also be restricted to a particular jobsite and directly related to employee interests in common sites relationships. 421 U.S. at 632 and 635.

III

SECTION 8(b)(4) PROHIBITS PICKETING TO OBTAIN RESTRICTIVE SUBCONTRACTING CLAUSES IN THE CONSTRUCTION INDUSTRY

Without regard to the presence or absence of a collective bargaining relationship, picketing or threats to picket by labor organizations to obtain union signatory clauses is banned by Section 8(b)(4)(A) of the Act. The Board's and the en banc panel's holding that picketing to obtain a subcontracting clause is protected by the construction industry proviso should be overturned by the Court. Assuming arguendo that the subcontracting clauses are proviso protected, the Board's reaffirmation of its holding in Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apts.), 148 NLRB 854 (1964), enfmt. denied on other grounds, 122 U.S. App. D.C. 220, 352 F.2d 606, (1965), adopted by the en banc panel, that a labor organization can lawfully picket to obtain such clauses is no longer tenable.*

* The Law prior to Centlivre, supra, is best summarized in the decision of the Trial Examiner in that case:

First, in 1959, Congress intended to preserve existing law with respect to subcontracting clauses, and existing law was that jobsite picketing to obtain such

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* Continued from previous page ...

"Thus, the issues here are brought squarely within the Colson and Stevens line of cases (Construction, Production and Maintenance Laborers Union Local 383, AFL-CIO, et al (Colson and Stevens Construction, Inc.), 137 NLRB 1650) in which the Board has repeatedly held that although the Section 8(e) proviso allows the described "hot cargo" type agreements in the construction industry on a voluntary basis, when coercion is used to obtain such agreements, Section 8(b)(4)(A) is violated, and trhe same conduct also violates the secondary boycott provisions in Section 8(b)(4)(B)." (Trial Examiner's Decision, Northeastern Indiana Bldg. Trades Council, supra, 148 NLRB 863).

a restrictive "hot cargo" agreement violated Section 8(b)(4)(A) (now Section 8(b)(4)(B)). The Board's present position is contrary to the intent of Congress. Second, the intervening Connell and Iron Workers decisions, supra, have re-emphasized the potential for subcontracting clauses to become "top down" organizing tools. As the stipulated facts of this case show, such clauses have the obvious consequence of forcing craft employees to become union members in order to secure for themselves the employment opportunities such clauses restrict to unionized contractors. This consequence is clearly foreclosed by the Connell Court's holding that union shoulder-to-shoulder interests reflected in Section 8(e) are not paramount to, but are subservient to, the primary purpose of the Act to protect the right of employees to "bargain collectively through representatives of their own choosing." (Section 7 of the Act.

Sections 8(e) and 8(b)(4)(A), prohibiting voluntary "hot cargo" agreements and union coercion to obtain such agreements, were enacted in 1959 to eliminate loopholes in the statutory secondry boycott prohibitions. These amendments responded to the decision in Carpenters v. NLRB, 357 U.S. 93 (1958) (hereinafter "Sand Door") wherein the Court ruled that picketing to enforce a "hot cargo" agreement was unlawful, such an agreement voluntarily entered into was permissible. In proscribing "hot cargo" agreements, Congress allowed a narrow exception for the construction industry. The first proviso to Section 8(e) authorized such agreements for work performed at a construction site if voluntarily agreed to. Legislative history uniformly demonstrates that the proviso was intended merely to preserve in that industry the law existing prior to 1959 [7]. The then existing law which Congress was aware of and about which it disclaimed any purpose to change

[7] The House Conference Report explained:

> "The committee of conference does not intend that this proviso should be construed so as to change

prohibited coercion to obtain or initially secure adherence to restrictive subcontracting clauses. Prior to 1959

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[7] Continued ...

"the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts will be illegal under the Sand Door case .... To the extent that such agreements are legal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The proviso applies only to Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4).

* * * *

"The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project.

* * * *

"It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract. H.R. Rep. No. 1147 on S. 1555, 86th Cong. 1st Sess. 39-40 (1959)."

picketing of any person to obtain a hot cargo agreement violated Section 8(b)(4)(A), now Section 8(b)(4)(B) [8].

From this legislative history, it logically follows that if transmitting proscribed pressures through the contractual provisions to the moment of boycott are prohibited, these same pressures, applied at the inception of the contract, likewise were intended to be proscribed by the pre-1959 statute. Otherwise initial concern to obtain an agreement to boycott other contractors may be effectively transmitted to that later moment when the contractor honors the agreement - the very result Congress originally intended to prohibit in 1947. Therefore, the seeking of such restrictive agreements to be applied in the future was, like coercion to enforce such a boycott, an object proscribed by

[8] Bricklayers, Int'l Union of America (Selby-Battersby & Co.), 125 NLRB 1179 (1959); Bangor Building Trades Council, 123 NLRB 484 (1959), enf'd, 278 F.2d 287 (1st Cir. 1960); Texas Inds. Inc., 112 NLRB 923 (1955), enf'd, 234 F.2d 296 (5th Cir. 1956).

the original Section 8(b)(4)(A) enacted in 1947. In adopting this preexisting law, the 86th Congress exempted only voluntary agreements in the construction industry. As Congressman Barden explained:

> "The first proviso under subsection (e) of section 704 permits the making of voluntary agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." Vol. II, Leg. Hist. of LMRDA at 1715.

Notwithstanding this express Congressional condemnation of coercion efforts to obtain "hot cargo" agreements, the Court of Appeals for the District of Columbia reached a contrary result in Orange Belt District Council of Painters v. NLRB, 117 U.S. App. D.C. 233, 328 F.2d 534 (1964) [9]. Thereafter, the Board

[9] See also Laborers Union, Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963); Bhd. of Carpenters v. NLRB, 332 F.2d 636 (3rd Cir. 1964).

after first reaching a result fully consistent with the above noted Congressional intent, acquiesced to the Circuit Court's literal reading of Section 8(b)(4)(A), and "legalized" coercive efforts to obtain union signatory clauses. Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apts.), 148 NLRB 854 (1964), enf'mt. den. on other grounds, 122 U.S. App. D.C. 220, 352 F.2d 606 (1965). Not only is Centlivre contrary to the unambiguous intent of Congress detailed above, but its holding and rationale is also overruled by the intervening Connell and Iron Workers decision, supra, which conclusively undermine the supporting analysis which is the predicate for the Board's Centlivre holding.

What Connell did hold of major significance here is that the terms (and type of) subcontracting agreement protected by the proviso is narrower than previously construed by the Board and the courts. Because the exemption is narrowed, Section 8(e) prohibitions are correspondingly expanded. Accordingly, Section 8(e) prohibitions must be given wider scope to accommodate the Connell

rationale. The touchstone now must be that Section 7 rights prevail over any foreseeable consequences, direct or indirect, that a form of subcontracting restrictions will exclude non-union employees from jobsites regardless of representational interests of the affected employees.

Iron Workers, supra, affirms Congress's intent to authorize only voluntary § 8(f) agreements, and thus, whenever § 8(e) clauses are included in § 8(f) agreements, as in Schriver-Topaz, coercive efforts to obtain initial employer acceptance is contrary to this unequivocal legislative intent. The limitation upon the scope of the construction industry proviso now made explicit in Connell, and the limitations upon the scope of § 8(f) agreements affirmed in Iron Workers, supra, are both premised upon identical federal labor policy -- the primary purpose of the NLRA is to fully effectuate the free choice of employee representational interests. The analysis adopted by the Court in these two recent decisions eschews narrow review of a single term or provision of

a single term or provision of the Act, as in Orange Belt District Council Painters v. NLRB, supra, and properly considers "the provisions of the whole law, and ... its object and policy." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956); Accord: Golden State Bottling Co. v. NLRB, 414 U.S. 168, 177 (1973); NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957). Otherwise, coerced contractual arrangements entered into between employers and unions in the construction industry would provide a means of frustrating the NLRB's protection and effectuation of employee rights. NLRB v. Pipefitters, Local 638, 429 U.S. 507, 517-21 (1977); National Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940). Accordingly, Centlivre must now be reversed.

CONCLUSION

For all the foregoing reasons and the reasons presented by the Petitioners, the amici curiae respectfully urge the Court to set aside the holding of the

en banc panel and affirm the position of Petitioners.

Respectfully submitted,

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Dated at Chicago, Illinois
this 19th day of November, 1981